Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A01-20 OF 1994
GOPAL SRI RAM, SITI NORMA YAAKOB AND MAHADEV SHANKAR JJCA
30 JANUARY 1995

Administrative Law *— Rules of natural justice — Dismissal of police officer — Whether right to be heard necessarily includes right to oral hearing — Whether failure to give oral hearing may be challenged — Whether extraneous matters not put to plaintiff considered — Failure of judge to address issue — Whether failure of justice occasioned*

Constitutional Law *— Public servants — Dismissal — Police officer — Right to be heard — Extraneous matters not put to plaintiff considered — Whether constitutional right infringed — Federal Constitution art 135(2)*

Civil Procedure *— Pleadings — Necessity for express pleadings — Dismissal of plaintiff from police force — Fairness of procedure raised in pleadings — Whether all matters relevant thereto put in issue — Whether further specific plea needed*

Administrative Law *— Rules of natural justice — Dismissal of police officer — Measure of fairness — Standards and values to be applied — Whether foreign concept of fairness applicable*

This was an appeal from a decision dismissing the plaintiff's claim for a declaration that his dismissal from the police force was null and void. At the trial, the defendants submitted that there was no case to answer and elected not to call evidence. The plaintiff was an assistant superintendent with the Royal Malaysian Police Force when he was dismissed. On 16 December 1988, the secretary of the Police Services Commission (the first defendant) wrote to the plaintiff informing him of the commission's decision to institute disciplinary proceedings against him on charges, inter alia, of gross dereliction of duty and corruption. Each of the charges was carefully framed and particularized. The plaintiff responded giving a very full explanation of the allegations made against him and requested for an oral hearing as well as for certain documents which were later supplied to him. The plaintiff then made a further written response. No oral hearing was held and by a letter of 4 April 1990, the first defendant informed the plaintiff of the commission's decision to dismiss him after considering the plaintiff's explanations in his two letters, 'and other information'.

In this appeal, the plaintiff submitted that the defendants were under a duty to act fairly, which included the obligation to give him an oral hearing. The failure to do this had deprived the plaintiff of his right to be heard which is enshrined in art 135(2) of the Federal

A Constitution. The plaintiff alternatively submitted that the defendant had taken into account material information which had never been put to the plaintiff and without giving him the opportunity to comment on it. The defendants argued that: (i) the words 'and other information' in the letter of 4 April 1990 were mere surplusage and should be ignored; (ii) the subject matter of the plaintiff's alternative submission was not sufficiently pleaded in his statement of claim; and (iii) the plaintiff's complaint was without merit because he had readily agreed under cross-examination that he had the opportunity to rebut the allegations made against him.

C **Held,** allowing the plaintiff's appeal and ordering his reinstatement:

(1) The right to be heard does not in all cases include the duty to afford an oral hearing. Nevertheless, it does not mean that the failure or refusal to afford such a hearing may not be challenged. In the present case, the absence of an oral hearing did not occasion any prejudice to the plaintiff. The charges were well drafted and care was taken to ensure that full particulars were provided. Sufficient opportunity was given to the plaintiff to make representations to rebut the charges.

(2) The words 'and other information' in the letter of 4 April 1990 left a reasonable man with the distinct impression that the defendants had considered material information that was never put to the plaintiff. A fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused with an opportunity for him to rebut them.

(3) The defendants could have explained the words used but opted not to call evidence. For the court to imply that the words uttered in such an important context were mere surplusage was to exceed the limits of judicial function. The trial judge appeared not to have addressed his mind to this, and it was a serious misdirection which had occasioned a miscarriage of justice.

(4) The statement of claim referred to the letter of dismissal and contained an allegation that the plaintiff had not been given a reasonable opportunity of being heard. Once the fairness of the procedure was sufficiently raised and challenged, then all relevant matters were put in issue without the need for a further specific plea in that respect. Therefore, it could not be said that the plaintiff's alternative submission was not sufficiently pleaded and had taken the defendants by surprise.

(5) The plaintiff's statement that he had had the opportunity to rebut the allegations made against him was merely an agreement upon an obvious matter for it was true that the letter of 16 December 1988 did give him an opportunity to answer the charges. However, the plaintiff was given no opportunity to deal with the 'other information' because no notice whatsoever was given of that material until after the dismissal became effective.

Per curiam:

The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the values of a foreign judge, however, eminent.

[Bahasa Malaysia summary

Ini adalah satu rayuan terhadap satu keputusan yang menolak tuntutan plaintif untuk satu deklarasi bahawa pemecatannya sebagai seorang anggota polis adalah tidak sah dan terbatal. Di perbicaraan, defendan telah berhujah bahawa tidak terdapat kes terhadap mereka dan memilih supaya tidak mengemukakan keterangan. Plaintif adalah seorang penolong penguasa Polis Di Raja Malaysia apabila beliau dipecat. Pada 16 Disember 1988, Setiausaha Suruhanjaya Perkhidmatan Awam (defendan pertama) telah menulis kepada plaintif untuk memberitahunya tentang keputusan suruhanjaya itu memulakan prosiding tatatertib terhadapnya atas tuduhan, antara lainnya, pengabaian tugas yang keterlaluan dan rasuah. Setiap tuduhan itu telah dirangka dengan teliti dan perinci. Plaintif telah menjawab dan memberi penerangan yang penuh kepada dakwaan-dakwaan terhadapnya. Beliau juga meminta satu pendengaran lisan serta beberapa dokumen tertentu yang kemudiannya diberikan kepadanya. Selepas itu plaintif telah membuat jawapan bertulis lanjutan. Tiada pendengaran lisan diadakan dan melalui sepucuk surat bertarikh 4 April 1990, defendan pertama telah memberitahu plaintif tentang keputusan suruhanjaya itu untuk memecatnya setelah mempertimbangkan penerangan plaintif dalam kedua-dua suratnya, 'serta lain-lain maklumat'.

Di dalam rayuan ini, plaintif berhujah bahawa defendan-defendan berkewajipan untuk bertindak secara adil terhadapnya dan tugas itu meliputi obligasi memberikannya satu pendengaran lisan. Kegagalan berbuat demikian telah menyebabkan plaintif kehilangan haknya untuk didengar yang termaktub di dalam perkara 135(2) Perlembagaan Persekutuan. Plaintif secara alternatif berhujah bahawa defendan telah mempertimbangkan maklumat penting yang tidak pernah dikemukakan kepada plaintif tanpa memberi beliau kesempatan untuk membuat komen tentangnya. Defendan berhujah bahawa: (i) perkataan-perkataan 'serta lain-lain maklumat' di dalam surat bertarikh 4 April 1990 itu cumalah berlebihan sahaja dan sepatutnya tidak diendahkan; (ii) perkara yang mengasaskan aduan di dalam hujah alternatif plaintif tidak dijadikan pli secara mencukupi di dalam pernyataan tuntutannya; dan (iii) aduan plaintif adalah tanpa merit kerana beliau telah bersetuju semasa pemeriksaan balas bahawa beliau telah menerima peluang melawan dakwaan-dakwaan yang dibuat terhadapnya.

A **Diputuskan**, membenarkan rayuan plaintif itu dan memerintahkan supaya beliau dikembalikan semula ke jawatannya:

(1) Hak untuk didengar tidak dalam semua kes merangkumi tugas untuk memberikan pendengaran lisan. Namun demikian, ianya tidak bermaksud bahawa kegagalan atau keengganan untuk B memberikan pendengaran sedemikian tidak boleh dicabar. Di dalam kes ini, ketiadaan satu pendengaran lisan tidak menyebabkan kemudaratan kepada plaintif. Tuduhan-tuduhan itu telah dirangka dengan baik dan defendan telah bercermat untuk memastikan yang perincian penuh diberikan. Peluang yang mencukupi telah diberikan kepada plaintif untuk membuat C representasi untuk mematahkan tuduhan-tuduhan itu.

(2) Perkataan-perkataan 'serta lain-lain maklumat' di dalam surat bertarikh 4 April 1990 itu meninggalkan seorang yang munasabah dengan tanggapan yang ketara bahawa defendan telah mempertimbangkan maklumat yang penting yang tidak pernah D dikemukakan kepada plaintif. Satu prosedur yang adil meliputi tugas seseorang pengadil supaya tidak mempertimbangkan perkara-perkara yang tidak terlebih dahulu dikemukakan kepada tertuduh dengan peluang diberikan kepada beliau untuk mencabar perkara itu.

E (3) Defendan sememangnya boleh menerangkan penggunaan perkataan tersebut tetapi memilih untuk tidak mengemukakan keterangan. Pembacaan secara tersirat oleh mahkamah bahawa perkataan yang digunakan di dalam konteks yang begitu penting itu cumalah berlebihan sahaja tentunya melebihi had fungsi kehakiman. Hakim perbicaraan nampaknya tidak memikirkan F tentang aspek ini dan ini adalah satu salah arahan yang serius yang telah menyebabkan suatu ketidakadilan.

(4) Pernyataan tuntutan merujuk kepada surat pemecatan itu dan mengandungi dakwaan bahawa plaintif tidak diberikan peluang yang munasabah untuk didengar. Sebaik sahaja keadilan prosedur G itu telah ditimbulkan dengan secukupnya dan dicabar, maka kesemua perkara yang relevan berkenaan dengannya menjadi isu kes tanpa keperluan satu pli spesifik tambahan tentang perkara itu. Oleh yang demikian, tidak boleh dikatakan bahawa hujah alternatif plaintif tidak dijadikan pli dengan mencukupi dan telah mengejutkan defendan.

H (5) Kenyataan plaintif bahawa beliau telah mendapat peluang untuk mencabar dakwaan yang dibuat terhadapnya cumalah satu persetujuan atas satu perkara yang ketara kerana memanglah benar bahawa surat bertarikh 16 Disember 1988 itu telah memberikannya peluang untuk menjawab tuduhan itu. Namun I demikian, plaintif tidak diberikan peluang untuk menghadapi 'lain-lain maklumat' itu kerana tiada notis sama sekali diberikan tentang maklumat itu hingga selepas pemecatan itu telah berkuatkuasa.

Per curiam:

Pengukuran keadilan yang diberikan kepada seseorang plaintif adalah satu soalan fakta dan takat, yang patut diputuskan menurut taraf dan nilai tempatan dan bukannya mengikut nilai-nilai seorang hakim luar negeri, betapa terkemuka sekalipun hakim itu.]

Notes

For cases on dismissal of public servants, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1036–1061.

For cases on the necessity for express pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2613–2629.

For cases on the rules of natural justice, see 1 *Mallal's Digest* (4th Ed) paras 366–368; [1989] Mallal's Digest 1207, 1248–1255; [1990] Mallal's Digest 993; [1991] Mallal's Digest 30–35; [1992] Mallal's Digest 30–33; [1993] Mallal's Digest 13–20.

Cases referred to

Commodore Pty Ltd v Perpetual Trustee [1984] 1 NZLR 324 (refd)

Dewan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Kanda, B Surinder Singh v Government of The Federation of Malaya [1962] MLJ 169 (folld)

Najar Singh v Government of Malaysia [1976] 1 MLJ 203 (refd)

Ong Ah Chuan v PP [1981] AC 648; [1981] 1 MLJ 64 (refd)

R v Immigration Appeal Tribunal, ex p Mehmet [1977] 2 All ER 602; [1977] 1 WLR 795 (refd)

Rohana bte Ariffin & Anor v University Sains Malaysia [1989] 1 MLJ 487 (folld)

Shamsiah bte Ahmad Sham v Public Services Commission [1990] 3 MLJ 364 (folld)

Legislation referred to

Federal Constitution arts 8(1), 132(1), 135(2)

Public Officers (Conduct and Discipline) Chapter 'D' General Orders para 26

Appeal from: Civil Suit No 21–68–90 (High Court, Ipoh)

A Iruthaya Raj (*VT Singham* with him) (*VT Singham & Co*) for the appellant.

Raja Ahmad Faridz bin Raja Mazlan (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court):

Introductory remarks

This is an appeal from the decision of Ong See Seng J, dismissing the plaintiff's claim for a declaration that his dismissal from the Police Force is null and void as being in breach of art 135(2) of the Federal Constitution and for consequential relief. At the conclusion of argument on 17 January 1995, we allowed the appeal, indicating at the time that reasons for the decision would be given and these are now delivered. For convenience, I will refer to the parties before us as 'plaintiff' and 'defendants', respectively.

The facts

The plaintiff was, until his dismissal that is the subject of the present challenge, a member of the Royal Malaysian Police Force holding the rank of assistant superintendent. On 16 December 1988, the secretary of the Police Services Commission (the first defendant) wrote to the plaintiff informing him of the commission's decision to institute disciplinary proceedings against the plaintiff under para 26 of the Public Officers (Conduct and Discipline) Chapter 'D' General Orders to which the plaintiff was subject. In the same letter, there were formulated four charges upon which the commission required the plaintiff to respond. In a gist, the charges included gross dereliction of duty, corruption and the making of a false entry.

Let it be said at once that the charges set out in the said letter, if proved, were most serious in nature warranting dismissal. Let it also be said that each of the charges was most carefully framed and with utmost particularity, so that the plaintiff should have had no difficulty in understanding their purport and in responding to them. The letter afforded the plaintiff 16 days within which to answer the charges in question.

The plaintiff, having received this letter on 30 December 1988, responded to it by a letter dated 13 January 1989. Apart from giving a very full explanation to the allegations made against him, he drew the commission's attention to the fact that the charges related to events that had allegedly taken place some two years previously and requested for an oral hearing before what he described as an 'independent tribunal'. He also requested for the station diary for the relevant period to enable him to refresh his memory of those past events to which the charges related so as to enable him to make a more meaningful response.

The documents requested for by the plaintiff were made available to him in September 1989. The plaintiff then made a further response by his letter dated 16 October 1989.

No oral hearing was held. Instead, by a letter dated 4 April 1990, the first defendant informed the plaintiff of the commission's decision to dismiss him with effect from the date of that letter. It states that the commission had taken into consideration the plaintiff's explanations in his two letters, 'serta lain-lain maklumat' (meaning, no doubt, other information

relevant to the charges), in coming to its decision. The letter does not identify this 'other information'. Nor is there any evidence on record to show that this other information was ever put to the plaintiff and he given an opportunity to comment upon it. I will say more about this later.

The trial of this action for a declaration that the dismissal was void took place on 16 June 1994. The plaintiff gave evidence and was subjected to cross-examination. At the close of the plaintiff's evidence, his case was closed, whereupon senior federal counsel who appeared for the defendants informed the judge that he was electing not to call any evidence and that he would stand on his submission that there was no case to answer. The judge then heard submissions of counsel and reserved his decision to 21 July 1994 on which date he dismissed the plaintiff's claim with costs. No reasoned judgment was delivered. However, there is a brief note of the learned judge's reasons for the decision he arrived at which I now reproduce below:

> From the evidence before me, the plaintiff has admitted that he read and he understood [the] contents of the charges against him. He also agreed he was given [the] opportunity to reply and rebut the allegations which he did by letter dated 13 January 1989 and also by a further reply, P1.
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> The plaintiff before submitting P1 requested to be furnished with two documents and they were furnished to him. He did not request for other documents. On the evidence it is my finding that the plaintiff had been granted every opportunity to be heard and offer his explanation. The right to be heard does not necessarily mean to be heard orally before the commission. It is also my finding that in P1 the plaintiff had waived his request for an oral hearing and he had also put his points of mitigation. As such I hold that there has been no breach of the rules of natural justice and the defendants had been fair in the conduct of the proceedings.
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> Accordingly I dismiss the plaintiff's claims herein with costs.

The argument of counsel

Before us, counsel for the plaintiff repeated the submissions that were advanced before the learned judge. I do not believe that I render any injustice to counsel by my summarizing his submissions in the following manner.

Counsel's primary submission was that the defendant was under a duty to act fairly towards the plaintiff in the matter of his dismissal. This duty included the obligation to afford the plaintiff the oral hearing that he had requested of the defendants. The deprivation of an oral hearing, counsel argued, was an unfair procedure which resulted in the deprivation of the plaintiff's constitutional right to a reasonable opportunity to be heard which is entrenched in art 135(2) of the supreme law of the Federation.

Counsel's alternative and narrower submission was that the plaintiff, in the particular circumstances of this case, had in any event not been given a reasonable opportunity of being heard. He submitted that this was because the defendants had, when arriving at their decision to dismiss the

A plaintiff, taken into account material information which had never been put to the plaintiff with an accompanying opportunity to comment upon that information.

In the view that we took of the law as settled by high authority, counsel for the defendants was not called upon to respond to the plaintiff's B primary submission, but to limit his reply to the plaintiff's alternative submission.

Counsel's first submission in response was that the words 'serta lain-lain maklumat' appearing in the first defendant's letter of 4 April 1990, were mere surplusage and should be ignored. His second submission was C that the subject matter of the complaint in the plaintiff's alternative submission was not sufficiently pleaded in his statement of claim and for that reason was not admissible. Thirdly, he argued that the plaintiff's complaint was without merit because the plaintiff had readily agreed under cross-examination that he had had the opportunity to reply and to rebut the allegations made against him, a factor that appears to have weighed D heavily in the mind of the judge when he came to dismiss the plaintiff's claim. Counsel's fourth submission, which I can only describe as startling, was that the defendants were entitled to take into account other information when deciding to dismiss the plaintiff without making that information available to the plaintiff and without giving him any opportunity to comment E upon it.

At the heart of the plaintiff's primary submission lies the concept of procedural fairness in its widest application. I prefer the term 'procedural fairness' to the traditional nomenclature 'rules of natural justice'. It is a concept that includes but is not limited to the rules of natural justice. It is F a very interesting area of the law. When I commenced writing this judgment, I was sorely tempted to deal with the full breadth of the argument advanced by counsel. It would have involved, amongst other matters, an historical examination of the concept of procedural fairness, a discussion on the effect upon administrative actions of the humanizing provisions of art 8(1) as explained by the Privy Council in *Ong Ah Chuan v PP* [1981] AC 648 G at pp 670–671; [1981] 1 MLJ 64 at pp 70–71 and, of course, a consideration of the full impact of the landmark decision in *Dewan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697. It is, as I have said, a very interesting area of the law that has offered me much temptation to enter upon a discussion of it.

H But the route I am compelled to take to arrive at my conclusion in this case has made it unnecessary to deal with the wider aspect of counsel's primary submission. Anything I say about it would therefore be wholly unrelated to the real issues in this appeal. Consequently, I have, learning from the primordial lesson, resisted the forbidden fruit of obiter dicta and I have instead elected to tread upon the safer path of ratio decidendi. The choice that I have made requires me to deal only with so much of the plaintiff's complaint in his primary submission that has to do with he not having been given an oral hearing.

Procedural fairness: the right to an oral hearing

When he first opened the appeal, counsel took the extreme position that the doctrine of procedural fairness entitled the plaintiff ex debito justitiae to a right to an oral hearing once a request for such a hearing was made, as had happened in this case. However, under the pressure of argument he had to retreat from his original submission and adopt the more sensible stand that in the particular and peculiar circumstances of this case, the failure to afford an oral hearing constituted procedural unfairness.

The proposition that the right to be heard does not in all cases include the duty to afford an oral hearing is well settled by binding precedent. (See *Najar Singh v Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114). That there can be no breach of a duty where none exists is axiomatic.

Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (See *R v Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602; [1977]1 WLR 795).

The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources: but in the final analysis, it is a question that is to be decided according to the Malaysian concept of fairness.

On the facts of the present case there was, in my opinion, no departure from procedural fairness by the defendants' failure to afford the plaintiff the oral hearing he had asked for. The charges were well drafted and care was taken to ensure that full particulars were provided. A reasonable man similarly circumstanced as the plaintiff would have had no difficulty in responding to the allegations made. Sufficient opportunity was given in the making of representations to rebut the charges, including the provision of documents requested for by the plaintiff. The suggestion by counsel that there is an added duty to provide documents without any request being made in that behalf is devoid of merit and is not supported by the well reasoned and comprehensive judgment of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin & Anor v University Sains Malaysia* [1989] 1 MLJ 487 which was cited to us and in which all the relevant authorities were collected and reviewed.

I have, in the circumstances of this case, no hesitation whatsoever in concluding that the absence of an oral hearing did not occasion any prejudice to the plaintiff. I am also entirely satisfied that he did not suffer

any substantial detriment in consequence of the deprivation complained of.

Procedural fairness — the alternative submission

I now turn to deal with counsel's alternative and more formidable argument that there was procedural unfairness meted out to him by reason of the defendants having taken into account material which was never made available to him and upon which he was never given an opportunity to comment. It turns upon the question whether he was deprived of his constitutional right to which I shall now refer.

Now, the right of a member of any of the services set out under art 132(1) of the Federal Constitution (and the plaintiff is such a member) in the matter of his or her dismissal or reduction in rank is enshrined in art 135(2) which provides as follows: 'No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard'.

This article has been the subject of curial scrutiny in several cases, of which *Kanda, B Surinder Singh v Government of The Federation of Malaya* [1962] MLJ 169, is the locus classicus upon the subject and in which Lord Denning made the following statement of principle [at pp 172–173]:

> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *nemo judex in causa sua*: and *audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are govemed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.
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> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1911] AC 179. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 LT 106, *R v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* [1951] 2 TLR 1189 to which might be added *R v Architects Registration Tribunal* [1945] 2 All ER 131, and many others.

Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words:

> 'In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.'

The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. *But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.* (Emphasis added.)

Pausing for a moment, I would observe that a literal reading of the judgment in *Kanda* may lead one to believe that an oral hearing is a sine qua non to the due observance of procedural fairness. Indeed this was the conclusion drawn by counsel for the plaintiff in support of his primary submission. But the opinion of the Board in that case must be read in its proper context: for the appellant there had indeed been given an oral hearing during the course of which the departures complained of by Inspector Kanda occurred. The decision in *Kanda* is no authority for the proposition that there must *in every case* be an oral hearing in order for there to be procedural fairness.

The plaintiff's alternative submission rests on the letter of dismissal dated 4 April 1990, which by reason of its importance, I had better reproduce. Omitting all the formal parts, it reads in substance as follows:

> Saya dengan hormatnya memaklumkan bahawa Suruhanjaya Pasukan Polis setelah menimbang dengan teliti alasan-alasan tatatertib yang dihadapkan ke atas tuan seperti surat SPP(R)211/5/1 KLT4 bertarikh 16 Disember 1988 dan jawapan yang diberikan oleh tuan melalui surat (PR)G/3798 bertarikh 21 Januari 1989 dan surat (PR)G/3798 bertarikh 16 Oktober 1989 *serta lain-lain maklumat yang berkaitan* maka Suruhanjaya Pasukan Polis dengan ini mengambil keputusan mengenakan hukuman buang kerja terhadap tuan berkuatkuasa mulai daripada tarikh surat ini diserahkan kepada tuan. (Emphasis added.)

The letter when read as a whole and the words that I have emboldened and underlined, when read in the light of all the surrounding circumstances, would leave a reasonable man with the distinct impression that the defendants considered and gave weight to certain material information that was never put to the plaintiff. Of course, it was always open to the defendants to have given a full explanation as to what was meant by that critical phrase. For example, it might have been explained away as mere

surplusage, having no meaning. It would then have behoved the judge to decide whether to accept such an explanation. But the defendants took the option of remaining silent: and all that I am left with are the printed words: and they mean what they say. To imply that words uttered in such an important context, especially in a case that has to do with the deprivation of a man's livelihood and reputation, are mere surplusage is to exceed the limits of the judicial function.

All that I have said thus far, in effect, disposes of the defendants' first submission.

From the note made by the learned judge it appears that he did not address his mind to this aspect of the case at all, despite a submission made in that behalf. This is a serious misdirection which has, in my view, occasioned a miscarriage of justice.

In *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364, the appellant was dismissed by the respondent for negligence and dereliction of duty. In arriving at its decision, the respondent had taken into account the appellant's record of past conduct without giving her an opportunity to explain or controvert its contents. The Supreme Court struck down the dismissal. There are three passages in the judgment of Jemuri Serjan SCJ (as he then was) that merit reproduction. They appear at pp 367, 368 and 369 and read as follows:

> The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took into account extraneous matters, namely, the appellant's record of past conduct which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.
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> ...
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> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> ...
>
> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 and *Fairmont Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255.
>
> It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

These passages and the judgment in *Kanda* support the proposition that a fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused and he given an opportunity to rebut or to comment upon the same.

That brings me to the defendants' second argument, which is that the point now under consideration was never raised by the plaintiff in his pleaded case. There is certainly a reference to the letter of dismissal in para 8 of the statement of claim accompanied by an allegation in para 9 that the plaintiff had not been given a reasonable opportunity of being heard.

I respectfully agree with the observation made during the course of argument by my learned sister, Siti Norma Yaakob JCA, that once the fairness of the procedure adopted was sufficiently raised and challenged, then all matters relevant thereto were put in issue without the need for a further specific plea in that respect. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd v Perpetual Trustee* [1984] 1 NZLR 324 at p 349.

I really do not see how the defendants can complain that they were taken by surprise; more so when they made no complaint before the trial judge when the point was raised by counsel for the plaintiff in his submissions. Further, there is nothing in the judge's note to say that the argument was being disregarded because it was not pleaded. In these circumstances, I am convinced that there is no merit in the pleading point.

I now turn to the third submission made on behalf of the defendants which is based on an alleged fatal admission made by the plaintiff during his evidence. According to the judge's note, this is what the plaintiff said under cross-examination: 'I agree I have the opportunity to reply and rebut the allegations made against me.'

This brief acknowledgement by the plaintiff, according to counsel, amounts to a concession by the plaintiff that procedural fairness was meted out to him and has the sweeping effect of precluding the plaintiff from making any complaint whatsoever about the procedure preceding his dismissal. A reading of the learned judge's note which he made when dismissing the action shows that he too felt the same way.

In my judgment, there are two reasons for dissenting from the submission of counsel and the view formed by the judge. Firstly, the response by the plaintiff is nothing more than an agreement upon a patently obvious matter: for it is but true that the letter of 16 December 1988 did give the plaintiff an opportunity to answer the charges formulated against him. Worse it would have been if the defendants had not even afforded the plaintiff such a basic right. Too much has been read into this rather unequivocal answer extracted under cross-examination.

Second, the question whether one accused of misconduct has been treated with procedural fairness is a mixed question of law and fact. It is a question of law as to what the fundamentals of fair procedure are and this is fairly well worked out in the decided cases. It is a question of fact and

of degree as to whether on the facts of a particular case, these fundamentals were duly complied with. The point here is that whilst the plaintiff was given an opportunity to rebut the material in the charges levelled against him (as he conceded), he was given no opportunity to deal with the 'serta lain-lain maklumat yang berkenaan' because no notice whatsoever was given of this material until after the dismissal became effective. In my judgment, the so-called admission, even assuming for a moment that it is indeed an admission, is of no consequence whatsoever for it dwells upon an opinion which the law leaves with the court.

For these reasons, I reject the third argument advanced by counsel for the defendants.

That brings me to the fourth and final argument of learned federal counsel which I have already described as startling. No authority was cited in support of the proposition that an adjudicating body may ex parte take cognizance of material information against an accused. Indeed, all authority upon the point is against the submission made and I need do no more than refer to the decision in *Shamsiah* which in fact goes the other way. The fourth submission is without merit, is against the weight of authority and is accordingly rejected.

Conclusion

For the reasons advanced hereinbefore, the appeal was allowed. The decision of the High Court was set aside; judgment was entered in terms of the declaration sought in prayer (a) and the order for reinstatement claimed in prayer (c) of the statement of claim, while the claim for damages in prayer (d) was dismissed. We also ordered the respondents to pay the costs of the appeal and those incurred in the court below. The usual order that the deposit paid into court be refunded to the appellant was also made.

Appeal allowed.

Reported by Kevin Ooi